RELEASES OF RIGHTS OF ACTION ACCRUING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

Many interesting and important questions may arise in connection with releases of claims for personal injury. Again, there is considerable body of law dealing with the question of releases of rights before the injury is sustained—that is, contracts exempting from liability. It is not intended to deal here with such cases. This note, accordingly, must be limited; and all that will be attempted will be a brief discussion of certain special questions (principally as to parties) arising as to releases, given after the injury, of rights arising under the Federal Employers' Liability Act.

Obviously, in considering the release of a right, the first questions to be determined are, what is the nature of the right, and in whom is it vested? These questions are answered in the case of St. Louis, etc., R. Co. *v.* Craft, 237 U. S. 648, 59 L. Ed., 1160. The Act (as amended April 5, 1910; the situation was different before; Michigan, etc., R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed., 417) confers two separate rights of action, viz.: (1) A right of action in favor of the injured employee, which (under the amendment of April 5, 1910), in the event of his leath survives to his personal representative for the benefit (a) of the surviving widow or husband and children; or, if none, (b) of the parents; or, if none, (c) of the next of kin. (2) In case of death resulting from the injury, a new right of action in favor of the personal representative for the benefit of the relative named above.

(1) The Employee's Right of Action.

Taking up these in order, it is entirely clear that if the employee is injured, and death does not result, a release from the employee alone is sufficient.

Moreover, if such release has been given, and the employee subsequently dies, whether or not as the result of the injury, it is obvious that the cause of action in his favor, which the amendment of 1910 provided should survive to his personal representative, having been extinguished by the release, is at an end.

As to the new cause of action given the personal representa-

tive in favor of the designated relatives, the Supreme Court of the United States has not yet had occasion to consider the effect of a release given by the employee in his life time. It is believed, however, that when this question is presented, the release will be held to be an effective bar to a subsequent action. A very strong argument to the contrary, based on the theory that an independent cause of action in favor of the wife and children cannot be divested by any act of the employee, is made by the majority opinion, in connection with a similar statute, in the case of Rowe *v.* Richards (S. D.), 151 N. W. 1001, L. R. A. 1915E 1075, but it is conceded there, emphasized by the two dissenting opinions in the case, and demonstrated by the notes to Louisville R. Co. *v.* Taylor (Ky.), 27 L. R. A. (N. S.) 176, and State, etc., *v.* United, etc., Co. of Baltimore (Md.), L. R. A. 1915E 1163, that the overwhelming current of decision is to the contrary effect. Moreover in the Vreeland case, *supra,* the Court said: "But as the foundation of the right of action is the original wrongful inquiry to the decedent it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury."

If the decedent had released his rights, it would seem that the "new action" must fail. But as to this we cannot speak dogmatically, but only in terms of high probability. A similar conclusion persuasively results from Northern, etc., R. Co. *v.* Adams, 192 U. S. 440, 48 L. Ed. 513. See also 13 Cyc. 325; and, for the opposite view, Note in 70 Am. St. Rep. 669, at p. 684.

(2) THE PERSONAL REPRESENTATIVES NEW RIGHT OF ACTION.

Far more important to the practitioner is the question of how the new right of action given the personal representative in cases of death can be released, no release having been given by the decedent.

Upon this question the language of the act affords no solution; nor have there been found any decisions construing it in this regard. We are remitted, accordingly, to principle, and to decisions construing other statutes in *pari materia.*

It is clear that there may be at least three types of releases, having regard to the parties: (a) Releases by the personal rep-

resentatives; (b) Releases by all the beneficiaries; (c) Releases by some of the beneficiaries.

(a) RELEASE BY SOME OF THE REPRESENTATIVES.

As to these, while the intimations of some courts are otherwise (Parker *v.* Providence, etc., Co. (R. I.), 14 L. R. A. 414; Olston *v.* Oregon, etc., Co. (Ore.), 96 Pac., 1095, 20 L. R. A. (N. S.), 915) it is believed to be immaterial to examine the common law powers of a personal representative, for the reason that his functions under the act are of a special character, as trustee for certain designated beneficiaries, and not at all as the representative of the estate of the deceased. This is well brought out in the case of Washington, etc., R. Co. (Ill.), 26 N. E. 653, where a statute required personal representatives to secure the consent of the probate court to proposed compromises, but it was held that this did not apply to the compromise of death cases.

The following cases hold that a release by the personal representative is valid, in the absence of fraud. Loveman *v.* Birmingham, etc., Co. (Ala.), 43 So. 411. Henchey *v.* Chicago, 41 Ill. 136. Washington *v.* Louisville, etc., R. Co. (Ill.), 26 N. C. 653. Hemmick *v.* Baltimore, etc., R. Co. (Ill.), 104 N. E. 1027 (here the personal representative was the widow and was also guardian for the only child). Gipe *v.* Pittsburgh, etc., R. Co. (Ind.), 82 N. E. 471 (the case so holds by necessary implication, the release having been given by the personal representative, who was the widow, and there having been minor children; but the question is not discussed). Foot *v.* Great Northern R. Co. (Minn.), 84 N. W. 342 (but if obtained by fraud the Minnesota Court holds that it may be collaterally attacked in a new suit against the ortfeasor: Aho *v.* Jesmore, 112 N. W. 538, 10 L. R. A. (N. S.), 998; Aho *v.* Steel Co., 116 N. W. 590). Olston . Oregon, etc., Co. (Ore.), 96 Pac. 1095, 20 L. R. A. (N. S.) 915. Parker *v.* Providence, etc., R. Co. (R. I.), 14 L. R. A. 414.

It would seem that a release by a personal representative is good in California. In Hartigan *v.* Southern Pacific Co. (Cal.), 24 Pac. 851, it was held that the personal representative had the right to compromise, with the approval of the probate court; and there is cited to sustain this the case of Moulton *v.* Holmes, 57 Cal. 343, which holds that the approval of the court is merely

for the protection of the personal representative who, retains his common law right to compromise claims.

In Mississippi, the widow is the proper party plaintiff, though the recovery is to be distributed as personal property of the husband, which gives the children an interest therein; and in Natchez, etc., Co. *v.* Mullins (Miss.), 7 So. 542, a compromise by the widow of a $6,000 judgment for $1,000 was upheld over the protest of the children.

The law of Pennsylvania, for the purpose of this question, is the same as that of Mississippi, and a settlement by the widow is held valid. Shambach *v.* Middlecreek, etc., Co. (Penn.), 81 Atl. 802.

These cases inferentially support the right of the personal representative to release.

See also, construing the Pennsylvania statute, and reaching the same conclusion as the Pennsylvania Court, the decision of Judge Hand in Conover *v.* Pennsylvania R. Co., 176 Fed. 638 (distinguishing Southern Pac. Co. *v.* Tomlinson, 163 U. S. 369).

The case last referred to Southern Pac. Co. *v.* Tomlinson, 163 U. S. 369, 41 L. Ed., 193) arose under an Arizona statute giving the right to sue to all or any certain specified beneficiaries, and requiring the jury to allot the recovery. Under this verdict was obtained in a suit brought by the widow for herself and certain named beneficiaries, which verdict fixed the recovery in favor of each. The widow then filed a remittitur reducing all the recoveries, including her own, and fixing some at merely nominal amounts. This the Court held she could not do. The case is probably distinguishable from the Mississippi and Pennsylvania cases on two grounds: first, that under the Arizona statute, the beneficiaries other than the widow had the right, if so advised, to become parties to the record; and second, that in it the rights of the other beneficiaries had been fixed by what amounted to separate verdicts in their favor, and could not therefore be impaired by the widow. So far as I have been able to find, the case has never been cited save in Judge Hand's opinion, *supra*.

A somewhat peculiar situation exists in Tennessee and Missouri. In Tennessee, the statute gave the right to sue first to the personal representative, second, if he failed to sue, to the widow, and third, if she failed to sue, to the children or to a personal

representative for the benefit of the next of kin. In Greenlee *v.* R. Co. (Tenn.), 5 Lea. 417, it was held that the widow, rightfully suing, had the right to compromise, though the children had an interest in the recovery or compromise, as the case might be. The same holding was made in Stephens *v.* Nashville, etc., R. Co. (Tenn.), 10 Lea, 448, and in Prater *v.* Tennessee, etc., Co. (Tenn.), 58 S. W. 1068. Moreover, as long as the right to sue is vested in the widow, she may compromise as well before as after suit is brought, and may receive and give due acquittance for the amount paid by way of compromise. Holder *v.* Nashville, etc., R. Co. (Tenn.), 20 S. W. 537. But the situation is otherwise where the right has passed to the personal representative for the benefit of the next of kin. Then the widow is merely one of the beneficiaries, and cannot validly compromise the action. Knoxville, etc., R. Co. *v.* Acuff (Tenn.), 20 S. W. 348.

In Missouri, a similar statute gave the right first to the consort, and second, if there was none, or if he or she failed to sue within six months, to the minor children. In McNamara *v.* Stevens, 76 Mo., 329, the widow sued within six months, but later dismissed the suit—presumably having compromised it. It was held that the children had no right to sue. In Hamilton *v.* R. Co. (Mo.), 154 S. W. 86, it was held that the widow had the right to compromise before bringing suit.

In so far as these two states sustain the right of compromise in the person suing, they afford support for the position that the personal representative can validly release. The holding in Ohio seems to be to the contrary effect. Baltimore, etc., R. Co. *v.* Hottman, 25 Ohio Cir. Ct. R., 140, as digested in 7 Am. Dig. (Dec. Ed.) 391 (but the report of this case is not accessible to me.)*

*__Editor's Note.__—A release by a beneficiary under a benefit policy issued by a railroad company in her own name and as administrator, in consideration of the payment of the amount of the benefit, which is not consented to or approved by the probate court, does not affect the right of the minor children of deceased to recover against the company for the death of decedent by wrongful act. Where the record fails to disclose the consent of the probate court under § 6135, Rev. Stat. to a settlement with defendant for death caused by wrongful act, the conclusive presumption is that such consent was not given. Baltimore, etc., Ry. Co. *v.* Hottman, 25

And in New Jersey, there is a statement in Pisano *v.* B. M., etc., Shanley Co. (N. J.), 48 Atl. 618, that there are decisions in other states to the effect that the administrator is so purely a formal party that his release of the cause of action without the consent of the beneficiaries will not be permitted: but no such decisions are cited; and the statement was unnecessary to the decision of the case.

(b) RELEASE BY ALL THE BENEFICIARIES.

The courts generally hold that a release by the sole beneficiary, or by all the beneficiaries, is valid. Kennedy *v.* Davis (Ala.), 55 So. 104; Christie *v.* Chicago, etc., R. Co. (Iowa.), 74 N. W. 697; Sykora *v.* J. I. Case Threshing Co. (Minn.), 60 N. W. 108 (under Minnesota statute expenses of last sickness and funeral expenses must be met out of recovery, and persons having claims therefor are beneficiaries, but they must be demanded in the complaint, and settlement would in any case be good as against other beneficiaries). Schmidt *v.* Deegan, 69 Wis. 300, 34 N. W. 83; McKeigue *v.* Chicago, etc., R. Co., 130 Wis. 543, 110 N. W. 384, 11 L. R. A. (N. S.) 148; Doyle *v.* New York, etc., R. Co., 72 N. Y. Supp., 936 (but in this case it additionally appeared that the beneficiary had, subsequently to the settlement, been appointed administrator; and it was held that this appointment related back to the death of the intestate. Moreover, in New York, the sole beneficiary cannot settle so as to leave the personal representative burdened with funeral expenses. Bruck *v.* New York, etc., R. Co., 151 N. Y. Supp., 286).

Ohio Cir. Ct. Rep. 140. In this case the court said: "Now, it is contended on behalf of the railroad company that, although there is no consent shown to have been given by the probate court that appointed the administratrix, yet inasmuch as she signed these vouchers as administratrix, she cut off all right which her children had to recover any damages in this action. Now, considering the statute permitting recovery for wrongful death, I will remark that the action conferred by this statute is a creature of the law. The older members of the bar will remember when there was no such action or cause of action. The common law provides for no such cause of action, and if it were not for the statute there would be no cause of action on behalf of these children and none could be maintained. Now the cause of action being a creature of the statute, the statute must be complied with in all respects."

But a different doctrine obtains in Indiana: Yelton *v.* Evansville, etc., R. Co., 134 Ind. 414, 33 N. E. 626, 21 L. R. A. 158 (the reasoning of this case would indicate that the personal representative *has* the right to compromise, but the court states that he could only do this under authority of the Court). And in Kentucky: Louisville *v.* Hart's Admr., 143 Ky. 171, 136 S. W. 212, reported sub nom. Louisville *v.* Schneider, 35 L. R. A. (N. S.) 207 (but in this case the decision is expressly based on the circumstances that the Kentucky statutes expressly gave the personal representative the power to settle the claim, which power the court held to be exclusive).

(c) RELEASE BY SOME OF THE BENEFICIARIES.

The general doctrine is that any beneficiary can release his individual claim for damages, but not the entire right of action. Mella *v.* Northern S. S. Co., 127 Fed. 416 (this is really all this case decides, though in the note in 35 L. R. A. (N. S.) 207 it is cited to sustain the proposition that a widow-administratrix can, by release executed prior to her appointment, extinguish the right of the next of kin under the New York statute. The Court expressly, however, limits the effect of the release to her interest in the recovery). Pittsburgh, etc., R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Pittsburgh, etc., R. Co. *v.* Hosea (Ind.), 53 N. E. 419; Dowell *v.* Burlington, etc., R. Co., 62 Iowa, 629, 17 N. W. 901 (qu:. whether it is a fair inference from this case that the widow, had she been administratrix could validly have released the claim). McVeigh *v.* Minneapolis, etc., R. Co., 110 Minn. 184, 124 N. W. 971; Chicago, etc., R. Co. *v.* Wymore, 40 Neb. 645, 58 N. W. 1120; Chicago, etc., R. Co. *v.* Healy (Neb.), 111 N. W. 598, 10 L. R. A. (N. S.) 198. (In both the last two cases the widow was also the administratrix, but in the first it is stated expressly, and in the latter implied, that she did not release in that capacity). Houston, etc., R. Co. *v.* Bradley, 45 Tex. 171. It should be stated that this doctrine is so generally applied that exhaustiveness in the citation of authority has not been attempted.

FURTHER AUTHORITIES ON GENERAL SUBJECT.

Those desiring to go into the subject further and more exhaustively may profitably consult the following authorities: 13

Cyc. 325 et seq. (Tit. "Death"). 34 Cyc. 1080 (Tit. "Release"); 15 Am. Dig. (Cent. Ed.) Sec. 27; 7 Am. Dig. (Cent. Ed.) Key No. Sec. 25; Notes 14 L. R. A. 414; 21 L. R. A. 158; 8 L. R. A. (N. S.) 384; 11 L. R. A. (N. S.) 418; 27 L. R. A. (N. S.) 176; 35 L. R. A. (N. S.) 207; L. R. A., 1915E pp. 1095, 1104, 1163.

CONCLUSIONS AS TO RELEASE OF NEW RIGHT OF ACTION.

The following conclusions are suggested: (1) That a release by the personal representative in the absence of fraud, is probably good. (2) That a release by all the beneficiaries is almost certainly good; and (3) That a release by one or more of the beneficiaries is good as against him or them.

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